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No. 97-474

In the Supreme Court of the United States

OCTOBER TERM, 1997

ESTATE OF BENJAMIN SHAPIRO, ETC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
DAVID ENGLISH CARMACK
PAMELA C. BERRY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether there was an overpayment of estate tax installments.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 111 F.3d 1010. The opinion of the Tax Court (Pet. App. 22a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1997. The petition for rehearing was denied on June 13, 1997. The petition for writ of certiorari was filed on September 11, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Benjamin Shapiro died on July 2, 1986 (Pet. App. 3a). His estate, which is the petitioner in this case, filed a federal estate tax return reporting taxes owed

of $1,197,127. Full payment of those taxes was not remitted with the return (*ibid.*).

Federal estate taxes are generally due within nine months after the decedent's death. 26 U.S.C. 6075(a), 6151(a). When the value of the decedent's interest in a closely-held business exceeds 35 percent of his gross estate, however, the estate may elect under Section 6166 of the Internal Revenue Code to defer payment of the portion of the federal estate taxes attributable to that interest. 26 U.S.C. 6166. That Section permits the estate to pay this amount in ten equal annual installments, beginning five years after the tax would otherwise be due. 26 U.S.C. 6166(a). Annual payments of interest on the deferred portion of the estate tax liability are required. 26 U.S.C. 6166(f). If the estate fails to make either an installment payment or an annual interest payment within six months of the time that it is due, the Commissioner is authorized to demand full payment of the deferred liability. 26 U.S.C. 6166(g)(3). In the present case, petitioner elected under Section 6166 to defer payment of the bulk of the $1,197,127 reported due (Pet. App. 4a).

2. In September 1990, the Commissioner issued the estate a notice of deficiency in the amount of $208,540.56 (Pet. App. 4a). This resulted from the partial disallowance of a credit claimed by the estate under Section 2013 of the Internal Revenue Code, 26 U.S.C. 2013. That Section allows a credit against the federal estate tax for any payment of federal estate taxes made with respect to a transfer of property to the decedent during the ten years prior to his death. Petitioner sought review of the deficiency in Tax Court.

3. During the pendency of the Tax Court case, a further dispute arose with respect to the amounts

owed by petitioner under its Section 6166 election (Pet. App. 4a-6a). Petitioner maintained that, in order to obtain interest expense deductions for the interest that it paid pursuant to Section 6166, the estate should be permitted to recalculate for each year (i) the annual payment of interest owed on the deferred estate tax liability and (ii) the amount of its annual installment payments of tax (*ibid.*).

a. Section 2053(a)(2) of the Internal Revenue Code provides a deduction for administrative expenses in calculating the federal estate tax liability. 26 U.S.C. 2053(a)(2). Before the statute was recently amended,[1] administration expenses included the annual interest payments owed on the deferred estate tax liability. Rev. Rul. 78-125, 1978-1 C.B. 292; see also *Estate of Bahr* v. *Commissioner*, 68 T.C. 74 (1977), *acq.* 1978-1 C.B. 1. A deduction is not permitted, however, for interest expenses until those expenses accrue. *Estate of Bailly* v. *Commissioner*, 81 T.C. 246, 252, modified by 81 T.C. 949 (1983). Under the terms of Revenue Procedure 81-27, 1981-2 C.B. 548, the IRS permits, in limited circumstances, the recalculation of future installment payments of tax and annual payments of interest to account for the deduction of interest that has in fact been accrued and paid (Pet. App. 28a-30a).

b. The IRS disagreed with petitioner's recomputation of its annual payments of interest and installment payments of tax under these provisions. The

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[1] Section 503 of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 852-53, amended Section 2053 to provide that, for decedents dying after December 31, 1997, interest paid on estate taxes deferred under Section 6166 will not be deductible.

IRS assessed penalties and interest against the estate based upon the difference between the amounts owed and the amounts paid (Pet. App. 5a). Petitioner refused to pay the penalties and additional interest and instead continued to make payments based upon its own calculations (*ibid.*). The IRS then notified petitioner that collection actions would be commenced unless the overdue taxes, interest, and penalties were paid (*ibid.*).

c. Petitioner then filed a motion in the pending Tax Court case to restrain the collection of the taxes, interest, and penalties (Pet. App. 5a-6a). When this motion was denied, petitioner remitted the amounts that the IRS had determined were due (*id.* at 6a).

4. On the substantive tax issue that gave rise to the litigation, the Tax Court held that petitioner had properly calculated the Section 2013 credit. *Estate of Shapiro* v. *Commissioner*, 66 T.C.M. (CCH) 1067 (1993). The Tax Court then ordered the parties to submit computations reflecting the amounts owed under the court's decision (Pet. App. 6a, 22a). The computations submitted by both parties under the court's decision reflected that petitioner had overpaid its federal estate tax liability by $225,118.50 (*id.* at 6a). The Tax Court entered judgment in accordance with these computations (*id.* at 22a-25a). The $225,118.50 overpayment was then refunded to petitioner (*id.* at 6a).

Petitioner requested the Tax Court to direct the government to return an additional sum of $478,840.07, which petitioner claimed was the amount of overpayment of the annual interest and installments of tax made pursuant to its Section 6166 election (Pet. App. 6a, 23a). The Tax Court rejected that request, pointing out that the Commissioner had

"credited all of petitioner's overpayments to unpaid estate tax installments leaving an overpayment of $225,118.50" (*id.* at 24a). The court further noted that petitioner's request was precluded by *Estate of Bell* v. *Commissioner*, 92 T.C. 714 (1989), aff'd, 928 F.2d 901 (9th Cir. 1991), which held that "consistent with the plain language of section 6403, an overpayment of an estate tax installment payment under section 6166(a) shall be credited against any unpaid installments" (Pet. App. 24a-25a).

5. The court of appeals affirmed. The court noted that two distinct issues are presented in this case and that resolution of either in favor of the Commissioner would require affirmance (Pet. App. 7a-8a):

> The first [issue] is whether the Estate is correct that it should have been permitted to recalculate its estate tax liability, and thus reduce its periodic payments, to take into account the interest deductions provided for in § 2053(a)(2) as the interest accrued. The second [issue] is whether, if the Estate was improperly denied its right to do this, its "overpayments" should now be returned to it, with interest, so that it may repay them over time pursuant to § 6166.

Although the Tax Court had resolved the case in the Commissioner's favor on the second issue, the court of appeals chose to affirm on the first issue instead (Pet. App. 14a-21a). The court of appeals noted that nothing in the Internal Revenue Code requires the IRS to recalculate the annual payments of interest and installment payments of tax owed pursuant to a Section 6166 election to give effect to the deductibility of the annual interest payments (*id.* at 14a-18a). The court of appeals recognized that, in Revenue

Procedure 81-27, the Commissioner allowed estates that had invoked the provisions of Section 6166 to recompute the tax and interest owed upon the payment of each installment. The court concluded, however, that the IRS had a practice not to afford that relief during the pendency of a case in Tax Court "because of the difficulty in coordinating the activities of various branches of the IRS, and because the ultimate amount of estate tax liability inevitably remains in serious question during that pendency" (Pet. App. 19a). The court stated that the Commissioner's policy not to afford such interim relief during the pendency of a Tax Court case was reasonable because "[i]t makes "little sense to allow a taxpayer to supplement its estate tax return under an administrative abatement procedure that is not mandated by the Internal Revenue Code or the Treasury Regulations when the amount of liability is in genuine dispute" (*id.* at 19a-20a). The court concluded (*id.* at 20a):

> Because the IRS has abided by a reasonable—albeit unpublished—policy, the Commissioner did not abuse her discretion in refusing to allow the Estate to invoke Revenue Procedure 81-27. Accordingly, the Estate had no right to recalculate its estate tax liability as it made its annual interest and installment payments to reflect its deductions for accrued interest expenses under § 2053(a)(2). The Estate was properly given those deductions after the § 2013 issue had been resolved by the Tax Court, but it was not entitled to take them at an earlier time. In other words, the Estate did not overpay its installments, and it was hence not wrongly forced to pay a portion of its estate taxes prematurely.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Because the underlying statutory provision has been amended prospectively (see note 1, *supra*), the issue presented in this case lacks recurring administrative importance. Further review is therefore not warranted.

1. Revenue Procedure 81-27 permits the recalculation of future installment payments of tax and accompanying annual payments of interest owed as a result of a Section 6166 election to account for interest already paid and accrued. As the court concluded in this case (Pet. App. 19a-20a), however, that procedure is not available when, as here, the underlying determination of the amount of tax owed is controverted in a pending Tax Court case. In that circumstance, recalculation of the amounts owed is to be made as part of the Tax Court's decree, and that is precisely what occurred in this case (Pet. App. 24a-25a). See pages 4-5, *supra*.

Petitioner disagrees with the conclusion of the court of appeals "that * * * it was the practice of the IRS not to afford taxpayers relief under said Revenue Procedure *during the pendency* of a Tax Court case" (Pet. 11). As the court emphasized, however, the record supports that conclusion and no contrary evidence exists (Pet. App. 19a). The factual contention that petitioner now raises thus lacks any foundation. Review of that factual contention is not warranted.[2]

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[2] Petitioner also contends (Pet. 9) that it followed the procedures set forth in Rev. Proc. 81-27 in recomputing the decedent's federal estate tax liability and should therefore have been afforded the relief it sought. Under the reasoning applied

2. Petitioner also errs in contending that the decision in this case conflicts with decisions of this Court and of other courts of appeals. Petitioner cites a number of decisions for the proposition that the agency should be required to follow its own procedures (Pet. 12-16). As the court of appeals held in this case, however, the agency *was* following its own procedures (Pet. App. 21a). That holding of the court of appeals does not conflict with any of the decisions that petitioner cites.[3]

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by the court of appeals, it was not necessary to address this assertion—and the court did not do so. Petitioner's claim is, in any event, erroneous. Rev. Proc. 81-27 does not permit an estate to recompute unilaterally the annual interest payments and installment payments of tax that are owed pursuant to a Section 6166 election. Instead, it simply provides that the estate may supply information to be used by the IRS in determining the amount of any reduction in the estate's federal estate tax liability and any correlative reduction in annual payments of interest and installment payments of tax. The procedures set forth in Rev. Proc. 81-27 are available to an estate only after it begins to make installment payments of tax with respect to its Section 6166 election. They do not apply during the five-year period that precedes the time when the first installment payment of tax is owed. Rev. Proc. 82-120, 1982-1 C.B. 203. By the time relief under Rev. Proc. 81-27 could have been available, petitioner had already filed its petition in the Tax Court and relief was unavailable for that reason (Pet. App. 21a).

[3] Moreover, as the Tax Court concluded, petitioner in fact received a refund of the only overpayments of tax made by the estate. An overpayment occurs only when the entire amount of tax due has been overpaid, not when a single installment payment is too great. 26 U.S.C. 6403. The Tax Court correctly determined that, to the extent that petitioner's installment payments of tax and interest were excessive, the IRS properly credited these amounts against unpaid installments of tax (Pet. App. 25a).

3. The decision in this case lacks recurring administrative importance. Only the estates of decedents who die before January 1, 1998, can be affected by this decision. For decedents who die after December 31, 1997, interest paid on estate taxes deferred under Section 6166 will no longer be deductible. See note 1, *supra*.[4]

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[4] Even with respect to estates of decedents who die before January 1, 1988, this decision has little administrative importance. Only those estates eligible to elect deferral of federal estate taxes under Section 6166 *could* be affected by this decision. And, of that small group of estates, only those that have failed to comply with the terms of Rev. Proc. 81-27 and that are also involved in Tax Court litigation *are* affected by this decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
DAVID ENGLISH CARMACK
PAMELA C. BERRY
Attorneys

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